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Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 14

COMMONWEALTH COATINGS CORPORATION,

Petitioner,

—v.—

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY and A. C. SAMFORD OVERSEAS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

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The opinion of the United States Court of Appeals for the First Circuit is reported at 382 F. 2d 1010. The opinion of the United States District Court for the District of Puerto Rico is unreported.

Jurisdiction of the Court

Jurisdiction to review the judgment herein by writ of certiorari is invoked under 28 U. S. C. Section 1254. The judgment of the Court of Appeals was entered on September 27, 1967 (A. 195). The petition for certiorari was filed herein on December 21, 1967, and was granted on March 11, 1968.

Statute Involved

The Federal Arbitration Act, 9 U. S. C. §10 provides as follows:

"VACATION—GROUNDS REHEARING.

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

Other sections of the Act which may be pertinent to the consideration of the petition are set forth in Appendix "A" hereto.

Questions Presented for Review

1. In a tripartite arbitration, does the failure of a third or "neutral" arbitrator, to disclose his prior employment by one of the parties, on the projects involved in the arbitration, as well as on other projects, constitute evident partiality, corruption, fraud or misbehavior and, therefore, render the award in favor of such party invalid under the provisions of the Federal Arbitration Act?

2. Does the failure of the party by whom said arbitrator was employed to disclose such prior employment constitute procurement of the arbitration award by corruption or fraud and, therefore, render the award in favor of such party invalid under the provisions of the Federal Arbitration Act?

Statement of the Case

Petitioner Commonwealth Coatings Corporation (hereinafter referred to as "Commonwealth"), was a subcontractor of respondent A. P. Samford Overseas Inc. (hereinafter referred to as "Samford"), for the performance of painting work on five projects in Puerto Rico on which Samford was the general contractor (A. 41). The total amount of the subcontracts was $351,938.00 (A. 33). The subcontracts provided for progress payments to Commonwealth (A. 41). Although Samford received payment from the owners in excess of the amount due to Commonwealth for work performed by it, Samford failed to make payment to Commonwealth in the sum of $113,566.05 (A. 42-45).

Commonwealth instituted suit against respondents, Continental Casualty Company and Fireman's Fund Insurance Company in the United States District Court for the District of Puerto Rico on Miller Act bonds given on one of the projects. (40 U. S. C. §§270(a) and 270(b); A. 2, 12; Civ. 441-62, 442-62.)

The contracts between Commonwealth and Samford contained the following provision for arbitration (A. 46-47):

> "Article XII: If any question of fact shall arise under this contract, either party hereto may demand an arbitration by reference to a Board of Arbitration, to consist of one person selected by Contractor, and one person selected by Sub-contractor, these two to select a third, and in case these two fail to select a third within three days, he shall be named by the Architect or his authorized representative. In case either Contractor or Sub-contractor fails to name an arbitrator within three days after requested to do so, the Archi-

tect, or his authorized representatives, shall name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference. Arbitration of a demand or decision by the Architect or Owner shall be made within 5 days following notification to Sub-contractor of such demand or decision, otherwise Sub-contractor shall be bound thereby, unless the Owner shall agree to arbitration after that period. Provided, nothing contained herein shall excuse Sub-contractor from completion of the work in the manner provided in this contract nor shall the pendency of any dispute or arbitration proceeding excuse any delay, deficiency, default or noncompliance therewith."

Pursuant to such provision an arbitration proceeding was instituted between Commonwealth and Samford on the five sub-contracts (A. 31). Upon the institution of the Arbitration proceedings, the Sureties obtained orders in the United States District Court staying the actions against them pending the decision in the arbitration proceeding (A. 3, 13). (Civ. 441-62, 442-62.)

The Arbitration before three arbitrators resulted in a unanimous award on November 12, 1963 in favor of Samford discharging it from all liability to Commonwealth for any part and all of the unpaid balances on the sub-contracts in the sum of $142,435.51, and awarding Samford $15,872.35, which was the amount by which it was decided the completion costs in the sum of $158,307.36 exceeded the unpaid balances (A. 34).

Commonwealth then moved in the United States District Court to vacate the award on the ground, among others, that there was evident partiality in the arbitrators, that after the rendition of the award, Commonwealth learned that the third arbitrator and chairman of the Board of Arbitration had a prior association with Samford which had not been disclosed to Commonwealth, and that if Commonwealth had known of such prior association, it would not have consented to his appointment as an impartial arbitrator (A. 15, 21, 36, 54, 55-61). (Civ. 65-64, Federal Arbitration Act; 9 U. S. Code §10.) Commonwealth's motion to vacate the award was consolidated with the actions against the sureties, and left in abeyance until a final decision on the merits (A. 84).

Hearings were had in the District Court with respect to the prior association of the third arbitrator with Samford (A. 74-183). At the conclusion thereof, the District Court denied the motion, confirmed the award and directed judgment in favor of Samford and the sureties (A. 184-186, 187). Judgment was entered in the District Court on September 30, 1966 (A. 187). The Court of Appeals affirmed on September 27, 1967 (A. 192).

The facts as to the prior employment by respondent Samford of the third or "neutral" arbitrator Capacete, prior to the arbitration proceeding, on the very projects involved in the arbitration, as well as other projects, and the concealment thereof from the petitioner.

In accordance with the arbitration procedure established in the subcontracts Commonwealth designated as one arbitrator an attorney named Holman (A. 145). Samford designated arbitrator Chapman (A. 99). These two arbitrators designated one Jose L. Capacete as the third arbitrator and chairman of the Board of Arbitration (A. 135). Holman died 2 or 3 days after the first meeting of the arbitrators (A. 76, 145). Commonwealth's attorney asked Capacete if he knew the names of lawyers who in his opinion had been involved or knew anything about engineering. Capacete gave him a list of 5 or 7 lawyers. Among these was Hector Martinez Munoz, an attorney, who was designated by Commonwealth to take the place of the deceased arbitrator (A. 145, 146). At the time of the designation of the arbitrators, and prior to the arbitration hearings, Commonwealth's attorney, Carlos A. Romero Barcelo, investigated the arbitrators. He made the following affidavit in the District Court (A. 54):

> "I, CARLOS A. ROMERO BARCELÓ, under oath do hereby state as follows:
>
> 1—That my name is as aforesaid, that I am of legal age, single, Attorney at Law, and resident of San Juan, Puerto Rico.
>
> 2—That I have been the Attorney for Commonwealth Coatings Corp. in its claim against the bonding com-

panies and A. C. Samford Overseas, Inc., which claims were finally submitted to arbitration by order of this Court.

3—At the time of the designation of the arbitrators and prior to the arbitration hearings I investigated the arbitrators to discover if any of them had, in the present or past, any business or financial relationship with A. C. Samford Overseas, Inc. or any of its affiliated or holding companies or with Mr. Amos Samford himself. I found none.

4—None of the arbitrators ever informed me that any of them had any business or financial relations as aforesaid with Samford or any of his companies.

5—As a Lawyer, if I had known of any such relationship, I would have challenged said arbitrator's capacity.

IN WITNESS WHEREOF, I hereby sign my name on this 6th day of February, 1964 at San Juan, Puerto Rico.

CARLOS A. ROMERO BARCELO"

At the hearing in the United States District Court on the motion to set aside the award, Mr. Romero testified with reference to the failure of counsel for respondent to disclose the prior relationship between Samford and Capacete, as follows (A. 151):

"Q. Did Mr. Currie at any time during any of the examinations or before the arbitration was started ever tell you anything about Mr. José Luís Capacete's prior relationship with the Samford Company? A. No, he did not.

Q. If you had been told that would you have objected? A. I don't think I would have objected because I know Mr. Capacete, but I would certainly have told my client and given them the opportunity to determine.

Q. So as a result you never told them? A. No."

The respondents introduced no evidence to contradict the above testimony.

Subsequent to the rendition of the award by the arbitrators, Commonwealth discovered that Capacete had been employed by Samford in various matters including the very projects which were the subject of the arbitration, and had received payment from Samford for such services (A. 59).

Capacete testified on the hearing in the District Court as follows (A. 135-137):

"Q. Then, Mr. Capacete, did you meet, did you know Mr. Samford before this proceeding? A. Yes.

Q. How well did you know him? A. Well, I have seen him personally about four or five times. But I have done some work for his company.

Q. Prior to the commencement of the arbitration? A. Yes.

Q. And have you done work in any of the projects involved in this matter? A. Yes.

The Court: We had evidence to that. Mr. Capacete testified in some other hearing about that same thing.

Mr. Romero: I don't think so. Briefs were filed but there was no evidence.

Q. Mr. Capacete, you had worked for the oncological hospital and the Aguadilla housing projects, is that correct? A. Do you want me to give you a summation?

Q. Fine. A. During the years 1957 or 1958 to 1961 or 1962 I did some work for Samford Company of Puerto Rico and the Samford Company of the Virgin Islands. I did some drilling for foundation investigations and laboratory testing of materials. In several of these jobs, like the Aguadilla Housing Project and the oncological hospital, I believe the power plant, I did some work for the architects which indirectly was on the project where Samford's work was being carried on, but also I did some testing work for Samford after construction started. The work for the architects was prior to construction.

During construction I did some work in the testing laboratory.

Q. And you also did some work in the project in St. Croix? A. Yes.

The Court: You did that in your own personal capacity or for Foundation Engineering Company?

A. As Foundation Engineering Company of Puerto Rico, which I owned and which I supervise naturally.

Q. Was Samford aware of that fact, of course, Amos Samford? A. Yes, sir.

Q. Do you know whether Mr. Currie was aware of that fact? A. I have to say I imagine so, because I really don't know what goes through Mr. Currie's mind.

Q. Did you know Mr. Stein or Mr. Marcus before

commencement of the arbitration? A. No, sir. I met them at the arbitration.

Q. Did you know Mr. Manuel Nieto? A. No, I met him at the arbitration.

Q. Were you ever advised by Samford or their attorneys that this matter should be disclosed? A. No.

Q. Did you have any reason to believe that this matter should be disclosed? A. No.

Q. Was it ever disclosed? A. No."

Capacete further testified with reference to the payments received by him from Samford as follows (A. 139):

"Q. Would you indicate specifically what the services were? A. The services were drilling for foundation investigations, drilling for prospecting quarry in St. Croix and for testing construction materials such as sand, gravel and concrete and concrete blocks and compaction of the soil.

Q. During what period of time were these services rendered? A. Approximately 1957 to 1961 or perhaps 1962. But in about five years. Four or five years.

Q. How much money was involved in the rendering of these services, more or less? A. I would say in the order of—

Q. How much per year, let's say? A. Total I would say in the order of $12,000."

He testified with reference to the payments received for services rendered on the projects involved in the arbitration as follows (A. 140):

"Q. Mr. Capacete, do you recall specific projects involved in this arbitration? A. There were five proj-

ects to the best of my recollection. The Aguadilla Housing Project called Wherry Housing Project for the Armed Forces, laundry and power plant, oncological hospital and I don't remember the other.

Q. Do you recall whether your company did any work in connection with these projects? A. Yes. We did in about two or three of those projects, we did some testing work.

Q. Which had no relationship at all to the painting work? A. No.

Q. Do you recall about how much money was involved in these services? A. In the order of three or four thousand dollars, maybe two or three thousand dollars. I don't recall the exact figure.

Q. Was that work done for Samford or are you referring to work done prior to it? A. No, work done for A. C. Samford Company."

At one time Capacete was going to resign but at the request of counsel for the respondent he remained as arbitrator. His testimony was as follows (A. 135):

"Q. At one time you were going to resign from the Board of Arbitration? A. That's right.

Q. And you did write a letter to the parties to that effect, is that correct? A. Yes.

Q. Did anyone talk to you about not resigning? Did anyone talk you out of resigning? A. At one time I mentioned it to Mr. Currie and he said, if you are not going to Europe right now why don't you stay as Chairman of this Board, and I said, all right, I will, and I stayed."

It is to be noted that no representative of Samford took the stand to testify with respect to its prior business relationship with Capacete.

The extent of the concealment by the respondents of the relationship between Capacete and Samford is highlighted by the fact that when the arbitrator originally designated by Commonwealth died, and at the very time that respondents were concealing the prior business relationship with Capacete, counsel for the respondent sureties imposed a condition to the appointment of any substitute arbitrator by Commonwealth that he should have no prior business relationship with the parties. The above appears from the following colloquy between the Court and counsel on the hearing in the United States District Court (A. 88, 89):

> "Mr. Romero: We are attacking the other party who knew and should have known that this was a matter to be disclosed, so much so that the other party waived its right, upon Mr. Holman's death, for the naming of a new arbitrator, saying we were allowed to name a new arbitrator subject to the fact there was no business or prior relation between said arbitrator and the parties, that they should have notified our plaintiff of this fact so plaintiff could have made up its mind as to whether or not it would have accepted that arbitrator and they failed to so notify.
>
> • • • • •
>
> Mr. Romero: The only aspect to bring today is the fact that the Samford people knew about this and when we were going to name our arbitrator, one of the conditions they had on that was that our arbitrator had no prior relations with the parties.

The Court: You did not put the same conditions?

Mr. Romero: Your Honor, we did not assume such conditions existed. To us this is evidence of a guilty conscience.

The Court: This isn't a criminal case.

Mr. Romero: That Samford was aware of the situation and they were making sure the same situation did not exist on our side."

To the above, counsel for the respondents stated as follows (A. 91-92):

"Mr. Currie: We will attempt to expedite this and move forward, and I think I can cover every point. With reference to the first issue, it is very simple. I am dealing now with the requirement that Samford in giving Commonwealth Coatings the right to fill a vacancy on the Arbitration Board in a letter merely stated, we allow you to appoint anyone of your desire, provided, of course, reserving the right to object because they have an interest in the litigation or are involved in it. That was a very reasonable thing and quite understandable. The contract provided—

The Court: That argument, I am not going to pay any attention to that.

Mr. Currie: No need to go into that?

The Court: If they have the right they should have exercised it, regardless of whether your client insisted on that requirement as to the other arbitrator.

Mr. Currie: What happened, very simply, was that each party appointed an arbitrator. Those two appointed a third, one died, there was a vacancy, and under the law we could have applied to the Court to

fill the vacancy, but since Commonwealth arbitrated that, we told them they could fill the vacancy by anyone provided the person didn't have an interest in the arbitration. We had the right to make that inquiry and reservation the same as they did."

Capacete testified with reference to his friendship with petitioner's attorney Romero as follows (A. 146):

"Q. Mr. Capacete, how well do you know Mr. Romero or did you know Mr. Romero at the time of this hearing? A. Oh, yes, very well.

Q. Were you social friends? A. Well, I am a very old friend of his father. His father was one of the highest esteemed engineers in this island and then Carlos was together with me in the Rotary Club and I know him well, I would say, as a good friend of mine."

In other words, throughout the arbitration proceeding, Capacete concealed his relationship with respondent Samford even from his "good friend," the attorney for the petitioner.

The evidence indicates without contradiction that Capacete and respondents concealed their prior business relationship from the petitioner.

SUMMARY OF ARGUMENT

1. The concealment by arbitrator Capacete and respondent Samford prior to and throughout the arbitration proceedings of Capacete's prior employment by Samford on the very projects involved in the arbitration as well as on other projects rendered the award in favor of respondent Samford invalid under the Federal Arbitration Act.

2. Capacete, as the third or "neutral" arbitrator designated by the party-appointed arbitrators, is held to a standard of impartiality not required of the other arbitrators. His failure to disclose his prior business relationship with respondent Samford constituted a breach of such standard and evident partiality within the meaning of the Federal Arbitration Act.

3. On the undisputed facts as to the concealment of the business relationship between arbitrator Capacete and respondent Samford, public policy, as indicated by the Federal Arbitration Act, requires the vacating of the award herein.

POINT I

The failure to disclose the business relationship between arbitrator Capacete and respondent Samford constituted evident partiality, corruption, fraud and misbehavior so as to render the award in favor of said respondent invalid under Section 10 of the Federal Arbitration Act.

The Court of Appeals held in its opinion herein as follows (A. 193):

> "In our opinion there is a difficult line between what should, in good faith, be volunteered, and what may be left for inquiry. We may agree with appellant that where there is a disturbingly close relationship the very failure to make disclosure could be evidence of partiality, and we think it would have been far better if there had been disclosure here. However, we cannot say that the relationship was sufficiently close to establish 'evident partiality' within the statute as a matter of law."

We submit that there could not be a more disturbingly close relationship than the employment by the respondent Samford of the "neutral" arbitrator on the very projects involved in the arbitration, for which employment said arbitrator was paid by said respondent.

In *Rogers* v. *Schering Corporation*, 165 F. Supp. 295 (D. C. N. J., 1958), *aff'd* 271 F. 2d 266 (3 Cir., 1959), cert. den. 359 U. S. 991, which involved a motion to vacate an arbitrators' award, it developed during the hearings in the arbitration that the firm of one of the arbitrators had previously done business with one of the parties, that such

arbitrator had disclosed this fact to the American Arbitration Association prior to his appointment in response to an inquiry concerning circumstances capable of suggesting bias or possible disqualification. However, this disclosure was not communicated by the Arbitration Association or the arbitrator involved to the other party. The latter's counsel raised the issue of disqualification of such arbitrator by reason of such prior business relationship.

The Court referred to the Federal Arbitration Act (9 U. S. C. §10) providing for vacating an award where "evident partiality" or corruption exists. The Court vacated the award, holding as follows (p. 301):

> "The failure of the Administrator (of the American Arbitration Association) to communicate to the parties information disclosed by a prospective arbitrator bearing upon circumstances likely to create a presumption of bias, and the consequent prevention of the party to proffer a timely objection based upon that information, is more than a loose procedural informality. It goes to the heart of a body designed to resolve controversy—its integrity. In this instance it fails to protect what might be termed 'due arbitration process'."

The case at bar presents a much more stronger situation than *Rogers*. In our case, the respondents, their counsel; and Capacete not only deliberately failed to disclose the prior business relationship between Samford and Capacete, but they even went so far, during such concealment, as to impose a condition that a new arbitrator to be named by appellant should not have had a prior business relation with the parties (A. 88, 89); and when Capacete wanted to resign, respondent's counsel induced him to stay (A. 135).

In *Milliken Woolens, Inc.* v. *Weber Knit Sportswear, Inc.*, 202 N. Y. S. 2d 431, 11 A. D. 2d 166, *aff'd* 9 N. Y. 2d 878, 175 N. E. 2d 826, a motion to vacate an arbitration award on the ground of undisclosed prior relationships by arbitrators with one of the parties was granted. In that case the statute (Sec. 1462 of the New York Civil Practice Act) contained a provision identical to the Federal Arbitration Act, 9 U. S. C. Section 10(b) that an arbitration award may be vacated where there is "evident partiality," or where the arbitrators are guilty of any misbehavior by which the rights of any party have been prejudiced. In that case, there was no attempt to prove actual partiality, but it was contended that the award must be vacated because of the prior relationship, unknown and undisclosed, between the arbitrators and the respondents.

The Court held:

> "Since the waiver (of objections to partiality) is a matter of intention (Matter of City of Rochester, 208 N. Y. 188, 197, 101 N. E. 875, 877, 47 L. R. A., N. S., 151), the touchstone in these arbitration cases is the knowledge, actual or constructive, in the complaining party of the tainted relationship or interest of the arbitrator. Thus in Dukraft Manufacturing Co. v. Bear Mill Mfg. Co., 22 Misc. 2d 1057, 151 N. Y. S. 2d 318, McNally, J., set aside an award because no disclosure was made that business transactions between the arbitrator and one of the parties had increased considerably during the pendency of the arbitration proceeding. In Shirley Silk Co. v. American Silk Mills, 260 App. Div. 572, 23 N. Y. S. 2d 254, an award was vacated where the arbitrator designated by the respondent failed to reveal to appellant that, prior to the arbi-

tration, the firm of which the arbitrator was president had received a substantial award (in another arbitration) from a board of arbitrators of which the president of respondent was a member. See also Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 172 Misc. 1015, 16 N. Y. S. 2d 435, affirmed 259 App. Div. 992, 20 N. Y. S. 2d 985."

The Court quoted from *In Matter of Friedman*, 215 App. Div. 130 at p. 136, 213 N. Y. Supp. 369, at p. 375 where it was said:

"During recent years arbitration has been more and more resorted to for the settlement of business controversies. It therefore becomes of the utmost importance that in statutory proceedings of this character, where the rights of parties are adjudicated, not by trained lawyers and judges, but by fellow-businessmen, every safeguard possible should be thrown about the proceeding to insure the utmost fairness and impartiality of those charged with the determination of the rights of the parties. Nothing should be permitted to throw suspicion even upon the entire impartiality of arbitrators. The finality of an award of arbitrators, as compared with the reviewable decision of a judge or a referee, makes this all the more important, and that the tribunal which is to pass upon the rights of the parties be not subject to the slightest suspicion as to its fairness."

In 5 American Jurisprudence 2d, on Arbitration and Award, p. 652, Section 181, on Partiality of Arbitrators, it is said:

> "Partiality on the part of arbitrators is a well-recognized ground for the setting aside of awards. It is not necessary, in order to warrant the intervention of equity, that the partiality be evidenced by an unjust award. It has been held sufficient that the relationship between the arbitrators and one of the parties is of such a nature as to give clear grounds for suspicion of their proceedings and render it unlikely that they constituted the fair and impartial tribunal to which the other party is entitled."

In *American Guaranty Co.* v. *Cauldwell,* 72 F. 2d 209, 212 (1934, 9th Cir.), it was held that a business relationship between the arbitrators and one of the parties was sufficient to set aside an award as "inherently partial even though not corrupt or fraudulent."

In Glick, "Bias, Fraud, Misconduct and Partiality of the Arbitrator," Arbitration Journal, Vol. 22, p. 161 (1967), it is said:

> "One of the most complex issues that has resulted in frequent litigation is the determination of partiality and bias. A number of clearly disqualifying criteria have emerged. It has been held that an arbitrator presumably was not impartial when he * * * had an undisclosed form of business relationship with one of the parties * * *" (citing *Application of Siegel,* 153 N. Y. S. 2d 673 (1956)).

And in 7 De Paul Law Review 236 at page 239, in an article on "When May an Arbitrator's Award Be Vacated?" it is said:

"Thus, in cases where the conduct of the arbitrator has been found to be unjustified, the award will be set aside, and it is immaterial that the complaining party has not been damaged, or that the arbitrator has acted in good faith; the misconduct per se is sufficient.

"'It is not his [the arbitrator's] own consciousness of rigid justice that can support his determination of the controversy, nor his conviction in his own mind that he is so that can suffice. It is his external actions that will be subjected to scrutiny; and if these do not satisfactorily bear the test, the award will fall.'" (Citing Morse, Arbitration and Award, c. 19 (1892).)

In *Knickerbocker Textile Corp.* v. *Sheila-Lynn, Inc.*, 172 Misc. 1015, 16 N. Y. S. 2d 435, a "neutral" arbitrator was held to be disqualified and the award was vacated. The court quoting from *Dorlon* v. *Lewis*, 9 How. Pr. 1, said:

"'The fact that the referee is a man of high character and unquestioned integrity should not be allowed to influence the determination of that question; for it is essential to the administration of justice that even the appearance of evil should be avoided, and, where a man who accepts the position of referee has such relations with one of the parties to the litigation as to make it improper that he should decide the questions submitted to him, his character is not at all material, and the Court will enforce that rule against a man of high character as well as against one whose character is not so good.'"

In *Merolla* v. *Motor Vehicle Accident Indemnification Corporation,* 231 N. Y. S. 2d 760 (1962), it was stated:

> "The first requisite of an arbitrator is judicial impartiality and freedom from bias. 'In undertaking to act as arbitrators they assume a quasi judicial position. It follows therefore, that the existence of any facts which may operate to affect the impartiality of arbitrators will render such arbitrators incompetent to make a valid award, provided such facts were unknown to the complaining party.' (5 Corpus Juris, p. 63, 6 C. J. S. Arbitration and Award §46.)"

In *Kemp* v. *Rose,* 1 Giff. 258, 265, 65 Eng. Rep. 910, 913, the Court held:

> "Therefore, when it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in the situation of him to whom the decision was intrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of this Court.
>
> "Whether in fact the circumstance had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being, perhaps even unknown to himself. It is enough that such a circumstance did exist. * * * "

POINT II

A neutral arbitrator in a tripartite arbitration is held to a strict standard of impartiality not required of arbitrators appointed by the parties.

The position of the third or "neutral" arbitrator on a tripartite board has been distinguished from that of arbitrators designated by the parties themselves.

Whereas the courts have recognized that in a tripartite arbitration it is not to be expected that the arbitrators appointed by the parties should be completely neutral, the same situation does not apply to the third, or neutral, arbitrator, appointed by the two arbitrators designated by the parties.

Astoria Medical Group v. Health Insurance Plan, 11 N. Y. 2d 128, 133-134, 227 N. Y. S. 2d 401, 182 N. E. 2d 85, is a leading case on the subject of tripartite arbitrations. The Court there noted the difference between arbitrators selected by the parties and the neutral arbitrators, as follows:

> "This type of tripartite arbitration provision, requiring each side to name its own arbitrator and such party-designated arbitrators to agree upon a third neutral arbitrator, is one which has been widely used in both labor and commercial arbitration. (See Bell Aircraft Corp., 13 L. A. 813, 820-821; Lesser, Tripartite Board or Single Arbitrators in Voluntary Labor Arbitration?, 5 Arb. J. [N. S.] 276; Phillips, A Lawyer's Approach to Commercial Arbitration, 44 Yale L. J. 31, 47; Pirsig, The New Uniform Arbitration Act, 11 Business Lawyer [April, 1956] 44, 47; Note, The Use

of Tripartite Boards in Labor, Commercial, and International Arbitration, 68 Harv. L. Rev. 293, passim.) Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral', at least in the sense that the third arbitrator or a judge is. And, as might be expected, the literature is replete with references both to arbitrators who are 'neutrals' and those who are 'partial', 'partisan' or 'interested' and to arbitration boards composed entirely of 'neutrals' and those contrastingly denominated 'tripartite in their membership'. (Elkouri & Elkouri, How Arbitration Works [Rev. ed., 1960], p. 48; also, pp. 53, 61; see, also, Lesser, Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitration?, 5 Arb. J. [N. S.] 276, 279; Phillips, A Lawyer's Approach to Commercial Arbitration, 44 Yale L. J. 31, 47-48; Taylor, The Arbitration of Labor Disputes, 1 Arb. J. [N. S.] 409, 413.)"

The following note is annexed to the majority decision of the Court in the *Astoria Medical* case, *supra*, p. 138:

"As previously indicated (supra 11 N. Y. 2d p. 134, 227 N. Y. S. 2d 405, 182 N. E. 2d 87), the Advisory Committee on Practice and Procedure took 'cognizance of the common practice of each party appointing his own arbitrator who is not individually expected to be neutral' and declared that 'partiality of such arbitrators should not be a ground for vacating the award' (Second Preliminary Report of the Advisory Committee on Practice and Procedure [N. Y. Legis. Doc., 1958, No. 13], p. 146). To carry out its recommenda-

> tions, the Advisory Committee introduced a bill at this 1962 session of the Legislature (S. Int. 26, Pr. 26), now awaiting action by the Governor, which permits a vacatur of an award only where the 'partiality' is that 'of an arbitrator appointed as a neutral' (CPLR, §7511, subd. [b], par. 1, cl. [ii])."

The bill referred to in the above note was enacted into law and has become part of the Civil Practice Law and Rules (CPLR) of the State of New York. Section 7511 thereof referred to in the note provides as a ground for vacating an arbitration award, in addition to corruption, fraud or misconduct in procuring the award, "partiality of an arbitrator appointed as a neutral".

A similar provision is included in the Uniform Arbitration Act, which has been adopted in other States, and which gives ground for vacating an arbitration award where:

> "There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party."

The above provision appears in the statutes of Illinois, in Chapter 10, Smith-Hurd's Illinois Annotated Statutes §112(a)(2); Arizona, §12-1512, Arizona Revised Statutes; Maryland, in Art. 7 Annotated Code of Maryland §12; Massachusetts, in c. 251 Annotated Laws of Massachusetts §12; Minnesota, in Minnesota Statutes Annotated §572.19; and Wyoming, in Wyoming Statutes, 1957, §1-1048.12.

California provides for vacation of an arbitration award where "The rights of such party were substantially preju-

diced by misconduct of a neutral arbitrator" (Deering's California Code of Civil Procedure §1286.2).

It is apparent from the above that a strict standard of impartiality is applied with respect to a neutral arbitrator, which does not apply to arbitrators appointed by the parties.

Judge Fuld, who wrote the majority opinion in the *Astoria Medical* case wrote a dissent in *Cross Properties, Inc.* v. *Gimbels Bros. Inc.*, 12 N. Y. 2d 806, 236 N. Y. S. 2d 61, 187 N. E. 2d 129, in which he said:

> "In view of the fact that an award made by arbitrators is well-nigh conclusive, the courts must be especially careful, when the impartiality or objectivity of an arbitrator, appointed as a neutral, is challenged, to make certain that there were no undisclosed disqualifying relationships between such arbitrator and a party which might have prevented him from rendering an unprejudiced or independent decision. This has been a long-drawn-out, complicated and expensive proceeding, but I do not see how, if the integrity of the arbitral process is to be assured, we may uphold the determination made in this case. I would, therefore, reverse the order and judgment appealed from and vacate the award for the reasons stated by Justice Valente in his dissenting opinion below."

In I Industrial & Labor Relations Review, 386, at page 399 (1947-1948), an article on "Hazards in Labor Arbitration," it is said:

> "The judicial character of a tripartite type arbitration depends on the scrupulous impartiality of the disinterested member of the tripartite type panel".

In Harvard Law Review, Vol. 68, No. 2, pages 293-339 at page 319, on the use of tripartite type boards, it is said, "Counsel is not to assume, however, that the party-appointed commercial arbitrator will approach the case with the impartiality of a neutral arbitrator".

Reference to statutory changes as to partiality by a neutral arbitrator was noted in the Arbitration Journal, Vol. 14 (1959) in an editorial entitled "The Dilemma of Tripartite Type Arbitrations" where it is said (p. 199):

> "Following adoption of a Uniform Arbitration Act by the National Conference of Commissioners on Uniform State Laws, several states enacted or amended their laws so as to distinguish between 'evident partiality' by an arbitrator 'appointed as a neutral' and similar conduct by party-appointed arbitrators. In the former event, an award would be vacated, but not in the latter."

POINT III

Public policy, as indicated by the Federal Arbitration Act, requires that the award herein be vacated.

The discussion thus far relates to the prejudice to the petitioner and deprivation of its right to an arbitration free from partiality, bias, corruption and misconduct.

There remains to be discussed the public interest in a decision by this Court construing the Federal Arbitration Act with respect to vacating awards in arbitration where elements of partiality, fraud, corruption or misconduct appear.

In *Wilko* v. *Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168, this Court said (p. 431):

> "The United States Arbitration Act establishes by statute the desirability of arbitration as an alternate to the complications of litigation. The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation [citing authorities], and practice under its terms raises hope for its usefulness both in controversies based on statutes [citing authorities], or on standards otherwise created [citing authorities]."

Among the standards referred to by this Court for practice under the United States Arbitration Act were those stated in *Kentucky Leather Mills* v. *Jackson*, 206 Fed. 2d 111, 117 (6 Cir. 1953), cited by this Court in the *Wilko* decision, where it was said:

> "But it is the proof of bias, unfairness or partiality on the part of an arbitrator that results in unjust advantage, and calls for the setting aside of the award (citing cases). For arbitrators are selected to act in quasi-judicial capacity, in the place of a court, and must be fair and impartial so as to render a faithful, honest and disinterested opinion in carrying out their obligation to do justice to the parties through their award."

We submit that concealment of a prior business association by a neutral arbitrator and by the party by whom he was employed relating to the very projects involved in the arbitration does not conform to the above standards.

The very fact that arbitration awards may not be set aside for errors of law or fact, and that arbitrators may

receive all evidence whether or not such evidence would be admissible in a Court proceeding, and that to all intents and purposes an arbitration award is conclusive and final, makes it all the more imperative that such awards be free from any suspicion of bias or taint of partiality.

So in *Cahn* v. *International Ladies Garment Union, et al.*, 203 Fed. Supp. 191 (1962, U. S. D. C. E. D., Pa.) the Court said:

> "It was stated in Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 137 Mass. 424 (1884), at page 426:
>
> 'An arbitrator is a quasi-judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity [from suit] extends to him' ". (Bracketed matter supplied.)

In Webster, 9 Syracuse Law Review 56 (1958, at p. 60) it is said:

> "The existence of certain relationships between an arbitrator and one party, unless waived, may be sufficient to disqualify the arbitrator. The arbitrator is regarded as having a duty to disclose this relationship. When there is a relationship which should be revealed, the actual presence of bias on the part of the arbitrator is irrelevant. Thus an arbitrator who is a relative of one of the parties may be disqualified. A business connection, such as being a law-office associate or a partner of one of the parties to the dispute, constitutes an objectionable relationship."

And further at page 61 it is said:

> "The standard of conduct to which an arbitrator is held has been analogized to the standards which govern the conduct of a judge. The presence of a corrupt intent is not requisite to a finding of misconduct, but either actual prejudice or a bona fide possibility of prejudice is necessary."

CONCLUSION AND PRAYER FOR RELIEF

The order and judgment of the United States Court of Appeals should be reversed, the arbitration award herein vacated, and the parties directed to select a new board of arbitrators to hear and determine the controversy between them, de novo; or in the alternative as prayed for by petitioner (A. 56) the United States District Court be directed to hear and determine such controversy; and all the costs of said arbitration and proceedings herein should be assessed against the respondents.

Respectfully submitted,

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